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No. A-1058
IN THE

Supreme Court of the United States

October Term, 1983

REVEREND W. EUGENE SCOTT, Ph.D.,

Petitioner,

vs.

JOEL ROSENBERG, WILLIAM B. RAY, JEFFREY MALICKSON, WALLACE JOHNSON, and ARTHUR L. GINSBERG,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRUCE HENDERSON,
(Counsel of Record),
HENDERSON AND ESSER,
Attorneys at Law,
1615 South Glendale Avenue,
Glendale, Calif. 91205,
(213) 246-8124,
Attorneys for Petitioner,
Reverend W. Eugene Scott, Ph.D.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Questions Presented.*

1. Whether the United States Court of Appeals failed to abide by the restrictions placed upon governmental interference with the free exercise of religion which were formulated by this Court in *Sherbert v. Verner*, 374 U.S. 398 (1963), in that the Court of Appeals, after finding that a compelling state interest justified the intrusion into the rights of Petitioner, did not consider whether or not there existed an alternative and less burdensome means to satisfy those interests.

2. Whether the United States Court of Appeals violated the due process rights of Petitioner by refusing to remand the action to the District Court for an adjudication of the case on its merits after that Court had determined that Petitioner possessed the requisite standing to bring and that the Respondents had violated Petitioner's First Amendment rights.

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*Petitioner brings this action as an individual. All parties Respondent in this action are named in the caption.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner, Reverend W. EUGENE SCOTT, Ph.D., respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit which was filed on January 21, 1983, affirming the Summary Judgment of the United States District Court for the Central District of California.

Opinion Below.

The Opinion of the Court of Appeals is reported as .... F.2d .... (1983) and is reproduced in Appendix A (p. 1).

Jurisdiction.

The Judgment of the Court of Appeals was filed on January 21, 1983. A timely Petition for Rehearing and a Suggestion for Rehearing *En Banc* was denied on April 20,

1983. (App. B, p. 23) On June 30, 1983, Associate Justice William H. Rehnquist extended the time within which to file a Petition for a Writ of Certiorari to and including September 1, 1983. (App. C, p. 32) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provision Involved.

United States Constitution Amendments I and V which are printed in full in Appendix D, p. 33.

Statement of the Case.

Petitioner the Reverend W. EUGENE SCOTT, Ph.D., is the duly elected Pastor of Faith Center Church, a 36-year-old Christian Church of Congregational Polity with its main sanctuary located in Glendale, California. Petitioner was called to his position as Pastor after the Church's previous management, who sought to expand the Ministry of the Church through the use of radio and television, had brought the Church to the point of bankruptcy. Petitioner, and the Church's new Board of Directors, eschewed bankruptcy, and with the informed consent of the voting Congregation, began the task of repaying the Church's debts, and establishing a viable and vibrant Ministry. The radio and television outreach of the Church was the main tool for the instrumentation of the recovery plan.

In September of 1977, acting allegedly on a complaint received from one Paul Diederich, a former cameraman for the Church who was terminated for falsifying time cards, Respondents, all of whom are present or former employees and officers of the Federal Communications Commission, commenced an investigation of Faith Center Church. Respondents demanded access to all the Church's financial records. The Church responded in part to the demands of Respondents, but neither the Board nor the Congregation

could in good conscience comply with the demand for those records which would reveal the identity of its donors, including Petitioner. The basis for this refusal is grounded in the Christian beliefs of Petitioner and the denomination to which the Church belongs. Members of that denomination, the Full Gospel Fellowship of Churches and Ministers International headquartered in Dallas, Texas and composed of over 2,000 member Churches, are strictly commanded to give in secret. This based upon Matthew 6:1-4 which states: "Beware of practicing your piety before men in order to be seen by them; for then you will have no reward from your Father who is in heaven. Thus, when you give alms, sound no trumpet before you as the hypocrites do in the synagogues and in the streets, that they may have glory of men. Verily I say unto you, they have their reward. But when thou doest alms, let not thy left hand know what thy right hand doeth: that thine alms may be in secret; and your Father, who sees in secret, will reward you."

Any coerced disclosure of donations therefore directly violates a central tenet of Petitioner's religious beliefs. Respondents were advised that their demands infringed upon Petitioner's religious freedom, yet continued their demands. In August of 1978, Petitioner, finding no other recourse to protect himself against the intrusion of Respondents, brought this action for injunctive relief and for actual and punitive damages against the Respondents herein.

Before the United States Magistrate, the Respondents moved for Summary Judgment. This was granted on the issue of standing which was the be-all and end-all of the Magistrate's Report and Recommendation. "Because it is believed by the Magistrate that the 'lack of standing' of Plaintiff (Petitioner) is clear and dispositive, this Report does not analyze, report or recommend upon such additional contentions raised by the parties as lack of personal juris-

diction over four of the five Federal Defendants (Respondents), the lawfulness of the federal investigation of the corporations, the lawfulness of the state investigation, the propriety of the conduct of individual defendants, or the propriety of cooperation between the State Attorney General and the FCC, inter alia." (CR 110 pp. 22-23). Thus, because the Magistrate based his Report on the belief that Petitioner lacked standing, the violation of rights complained of in Petitioner's Second Amended Complaint were ignored, no discovery was allowed, and Summary Judgment was granted.

On appeal to the United States Court of Appeals for the Ninth Circuit, the Court disagreed with the Magistrate, finding both that Petitioner had the requisite standing (Opinion App. A, pp. 4, 6) and that the actions of Respondents did interfere with the Petitioner's rights under the First Amendment. (Opinion App. A, p. 16.)

The Court of Appeals, however, affirmed the Judgment of the District Court finding that a "compelling government interest" overrode the Petitioner's First Amendment rights. Herein lies the error which Petitioner respectfully prays be reviewed by this Court. In *Sherbert v. Verner*, 374 U.S. 398 (1963), this Court clearly held that when the violation of First Amendment rights are the object of governmental intrusion, not only must the Government demonstrate a "compelling state interest" in restricting religiously motivated actions, but must also demonstrate that no alternative means exist to achieve the Government's end without vitiating those rights.

REASONS FOR GRANTING THE WRIT.

Petitioner respectfully requests that this Court review the Judgment of the Court of Appeals on the grounds contained in Supreme Court Rule 17(c) in that the Court of Appeals ". . . has decided a federal question in a way in conflict with applicable decisions of this Court."

The Free Exercise Clause Demands That Government Use the Utmost Discretion When Their Actions Impinge Upon Religious Freedom.

In *Sherbert v. Verner*, 374 U.S. 398 (1963), this Court stated:

> "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation,' *Thomas v. Collins*, 323 U.S. 516, 530. . . . Even if consideration of such evidence is not foreclosed by the prohibition against judicial inquiry into the truth or falsity of religious beliefs, *United States v. Ballard*, 322 U.S. 78 . . . it is highly doubtful whether such evidence would be sufficient to warrant a substantial infringement of religious liberties. For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights. *Shelton v. Tucker*, 364 U.S. 479, 487-490; *Talley v. California*, 362 U.S. 60, 64; *Schneider v. State*, 308 U.S. 147, 161; *Martin v. Struthers*, 319 U.S. 141, 144-149." — 374 U.S. 398, 406-408.

In *Shelton v. Tucker*, 364 U.S. 479 (1960), this Court stated and presaged the rule in *Sherbert:*

"In a series of decisions this Court has held that, even though the governmental purpose being legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose. . . . In *Schneider v. State*, 308 U.S. 147, 60 S.Ct. 146, 150, 84 L.Ed. 155, . . . the Court noted that where legislative abridgment of 'fundamental personal rights and liberties' is asserted, 'the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.' 308 U.S. at page 161, 60 S.Ct. at page 151. In *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, the Court said that '[c]onduct remains subject to regulation for the protection of society,' but pointed out that in each case 'the power to regulate must be so exercised as not, in attaining permissable end, unduly to infringe the protected freedom.' 310 U.S. at page 304, 60 S.Ct. at page 903." (364 U.S. 479, 488-489.)

The reason for the rule is that the freedoms granted to citizens of these United States by the First Amendment have been recognized by this Court as having a preferred position in the constellation of our rights and liberties. (See *Marsh v. Alabama*, 326 U.S. 501 (1946); *Saia v. New York*, 334 U.S. 558 (1948).) Thus, the requirement that a compelling governmental interest be shown if free exercise of religion is to be abridged embodies the perception that only the most imperative demands of public order require restrictions of religious freedom. "[T]he essence of all that has been said

and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *accord, Thomas v. Review Board*, 450 U.S. 707, 718 (1981). Decisions holding such claims to be overbalanced "have invariably" rested on the existence of a "substantial threat to public safety peace or order." *Sherbert, supra*, 374 U.S. at 403. Even such paramount governmental interests as compulsory education of children (*Yoder, supra*, 406 U.S. at 221), or the uniform application of narcotics laws (*People v. Woody*, 61 Cal. 2d 716, 723-726; 394 P.2d 813, 818-820 (1964)) must yield to the small, still voice of each person's individual conscience.

The Court of Appeals Erred in Failing to Consider the Respondents' Refusal to Seek a Less Entangling Alternative.

While the Court of Appeals recognized that the actions of the Respondents violated the First Amendment rights of Petitioner, that Court concluded that because "The governmental interest in preventing some crimes is compelling, . . ." (Opinion App. A, p. 17) the allegations of Diederich justified the Respondents' intrusion into Petitioner's rights. The other branch of the *Sherbert* test was left undiscussed: there must exist no less entangling alternative to the intrusion. In this instant action, less burdensome alternatives were many and varied. The employment of these, coupled with a small degree of sensitivity on the part of the Respondents to the religious beliefs of others, could have prevented the confrontation which necessitated the bringing of this action. The letter from Diederich complained only that he had allegedly seen funds raised for certain projects and that he was not aware that those projects had ever been com-

pleted. Respondents, allegedly after further investigation, focused upon four questioned projects. The record reflects clearly that the Petitioner, and the Church which he pastors, cooperated fully with the Respondents to the limits of the tenets of their Faith. Job orders, invoices and other relevant material were provided to the Respondents not only for the four questioned projects but for twelve additional projects which the Church had undertaken and were, apparently, unquestioned and/or unknown by the Respondents. Only at the intrusion into the donation records of Petitioner and the other church contributors were Petitioner and his congregation compelled by their Faith to draw the line.

Further, even in regard to the donation records of the Petitioner, an alternative and less entangling alternative was presented to Respondents. Sworn affidavits of the Church personnel who had personal knowledge of the donations made by the Petitioner were provided early in the investigation. This was viewed by the Respondents as a bad faith refusal to turn over the demanded records.

The Court of Appeals places great weight upon the fact that Diederich signed the letter upon which the Respondents allegedly based their investigation since, "if knowingly false, could expose him (Diederich) to liability in tort for malicious prosecution. . . ." Yet, the affidavits by the Church personnel, who unlike Diederich, possessed personal knowledge of the factual situation, were willing to state under penalty of perjury that Diederich's incompetently made allegations were groundless. Were these affidavits found to be untrue, the affiants would not only be liable for civil liability, but would be exposed to prosecution under Title 18 U.S.C. §1621. These affiants were willing to make that commitment. Neither Diederich, nor any other witness during the six years of the Respondents' ongoing investigation

have been willing to do the same. Yet, the persecution of the Petitioner has continued grounded only upon the Respondents' sense of vendetta.

Because Summary Judgment Was Granted by the District Court on the Issue of Standing Without Examination of the Factual Record, the Court of Appeals, After Overruling the District Court on the Issue of Standing Erred in Failing to Remand the Action to the District Court for Adjudication on the Merits.

This Court in *Societe Internationale pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197 (1958) stated: "[T]here are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." (357 U.S. 197, 209.) This sentiment was repeated in *Speiser v. Randall*, 357 U.S. 513 (1958): ". . . the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (357 U.S. 513, 520-521.)

Here, the actions of both the District Court and the Court of Appeals have put Petitioner in a Catch 22. The District Court, as stated above, based its dismissal of Petitioner's action on the issue of standing alone. It allowed no establishment or examination of the factual record, and left the issue of the violation of Petitioner's First Amendment rights unadjudicated. The Court of Appeals concluded that the Petitioner had standing, and that his First Amendment rights were in fact violated. (See Opinion App. A, pp. 5, 7, 18.) That Court, however, based its determination that a compelling state interest which overrode the rights of Petitioner existed on a non-existent record from the District Court.

Summary Judgment, especially in an action involving the adjudication of First Amendment rights, is proper only when there are no disputed genuine issues of material fact. Federal Rule of Civil Procedure 56(c); *Gaines v. Haughton*, 645 F.2d 761, 769 (9th Circuit 1981), *cert. denied* 454 U.S. 1145, 102 S.Ct. 1006 (1982). In an action such as this, where the First Amendment rights of Petitioner had been violated, and factual questions regarding motive amongst the Respondents come into play, Summary Judgment is particularly inappropriate and violative of Petitioner's guarantee of due process of law under the Fifth Amendment. (See, *e.g.*, *Calnetics Corp. v. Volkswagen of America*, 532 F.2d 674, 683-684 (9th Circuit 1975), *cert. denied* 429 U.S. 940 (1976).)

Inherent in the test of balancing the interest of the Government with the First Amendment rights of the individual is the necessity to fully examine the factual circumstances before the balancing can occur. (*Speiser v. Randall, supra.*) When this balancing is done by a Court of Appeals after Summary Judgment in the Court below has prevented the construction of a factual foundation, the rights set forth in *Sherbert* are destroyed without the due process required by the Fifth Amendment. The record shows, for example, that Petitioner made only one public pledge of his funds, that Diederich now denies that he saw any fund raising irregularities on the part of Petitioner and the Church which he pastors, and that in the six years since the Respondents' investigation not one complaint from the viewing public has been made to Respondents in regard to the raising of funds. The Court of Appeals rendered their decision in the absence of a hearing on the merits during which these facts, and others, would have been elucidated. To deny Petitioner the right to such a hearing was error.

Conclusion.

For each of the foregoing reasons, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

BRUCE HENDERSON,
(Counsel of Record),
HENDERSON AND ESSER,
Attorneys for Petitioner,
Reverend W. Eugene Scott, Ph.D.

APPENDIX "A".

Opinion.

United States Court of Appeals for the Ninth Circuit.

Reverend M. Eugene Scott, PhD., Plaintiff-Appellant, vs. Joel Rosenberg, et al., Defendants-Appellees. No. 81-5387. D.C. No. CV 78-3132 AAH.

Filed: January 21, 1983.

Appeal from the United States District Court for the Central District of California.

Andrew A. Hauk, District Judge, Presiding. Argued and Submitted March 3, 1982.

BEFORE: WALLACE, SCHROEDER, and CANBY, Circuit Judges.

WALLACE, Circuit Judge:

Scott, the president and pastor of Faith Center Church (the church), brought this action for injunctive relief and for actual and punitive damages against five present and former officers and employees (the government employees) of the Federal Communications Commission (the FCC), alleging that they violated his first amendment rights during an investigation of the church's television and radio stations. The district court granted summary judgment for the government employees. We affirm.

I

Diederich, a former employee of one of the church's television stations, sent a letter to the FCC in which he alleged that Scott had solicited during broadcasts and subsequently received funds for projects which were never undertaken. He also stated his belief that Scott was using the stations for his personal gain. In response to that letter, the FCC instituted an investigation of the church's California television and radio stations. The FCC conducted a number

of interviews during which further allegations were made: that the stations had failed to log paid religious programming as commercial broadcasting, that Scott had misstated the amount of his personal remuneration during broadcast solicitations, and that Scott had made personal pledges during the broadcasts which he had never fulfilled.

Subsequently, two FCC employees made an unannounced visit to the television station located in the main church building to interview employees and investigate records. There is some dispute with respect to how clearly they identified the purpose of their visit and with respect to the scope of their request for access to church and station records. In any event, the church subsequently made available some, but not all, of the materials requested, and thereafter the FCC issued an order designating for hearing the station's application for license renewal and a notice of apparent liability for forfeiture for violation of 18 U.S.C. § 1343, the statute governing fraud by use of radio and television. The record does not indicate the status of the proceedings pertaining to that order. The church has apparently sought relief both before the FCC and in the courts. Those claims of the church, however, are not before us. Scott brought this action not in any representative capacity, but to vindicate his individual rights. He apparently does not, in his personal capacity, contest the FCC's request for station logs and for his salary records. He does, however, allege that the FCC's inquiry into his personal donations violates his free exercise rights under the first amendment.[1] Scott's claim that his religion requires donations to be made confidentially if they are to be received by God as sacrifices is not disputed.

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[1]Scott also claimed a deprivation of his fourth, fifth and ninth amendment rights, but cited no supporting authority. We find these claims frivolous.

The questions presented by this appeal are whether Scott has standing to bring this action; whether Scott has a legal basis for his claim under 42 U.S.C. § 1983, under 42 U.S.C. § 1985(3) or directly under the first amendment; whether the FCC employees violated Scott's first amendment rights; and, if so, whether the FCC employees are entitled to immunity. Summary judgment was appropriate because there is no genuine issue as to any material fact.

II

The government employees argue that Scott lacks standing to bring this action because the FCC investigation was directed towards the station and not Scott, and because the FCC requested only church records and none of Scott's personal records. We hold, however, that Scott has standing to assert his claim.

Article III of the Constitution limits the judicial power of the United States to the resolution of actual cases and controversies. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, ___ U.S. ___, ___, 102 S. Ct. 752, 757 (1982) (*Valley Forge*). A part of this article III requirement is the doctrine of standing. *Id.* at ___, 102 S. Ct. at 758. The "gist of the question of standing" is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). At a minimum,

> Article III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S. Ct. 1601, 1608, 60 L. Ed. 2d 66 (1979), and that the injury

> "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41, 96 S. Ct. 1917, 1924, 1925, 48 L. Ed. 2d 450 (1976).

Valley Forge, supra, ___ U.S. at ___, 102 S. Ct. at 758 (footnote omitted); *see Larson v. Valente*, 456 U.S. 228, ___, 102 S. Ct. 1673, 1680-83 (1982) (church, as well as its individual followers, had standing under article III to challenge state law requiring religious organizations that received more than half their total contributions from non-members to register and report to the state).

But even meeting this article III threshold for standing may be insufficient to gain access to the federal court for redress of certain claims. The Court has also articulated several prudential requirements which limit the category of persons who may invoke the powers of the federal judiciary. When the plaintiff's "asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *accord Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216-27 (1974). In addition, the "Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin, supra*, 422 U.S. at 499; *Tileston v. Ullman*, 318 U.S. 44 (1943) (per curiam).[2] Under these prudential

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[2]There are certain other prudential limitations on standing which are applied in appropriate circumstances. *See, e.g., Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 39 n.19 (1976) (the interest of the plaintiff must at least be "'arguably within the zone of interests to be protected or regulated' by the statutory framework within which his claim arises," *quoting Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)).

principles, the judiciary seeks "to limit access to the federal courts to those litigants best suited to assert . . . particular claim[s]" and "to avoid deciding questions of broad social import where no individual rights would be vindicated." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 9-100 (1979).

We conclude that Scott meets the constitutional requirement for standing. The FCC requested church records of Scott's donations. Scott alleges that his religious beliefs require that his giving be secret if it is to be efficacious. The government employees do not deny that this is a tenet of Scott's faith. Scott, therefore, may properly allege injury from disclosure of his donations. If the FCC has already procured the requested records, the alleged injury may be actual. If the FCC has not yet received the documents, but continues to threaten the church with a loss of its license for failure to produce them, the alleged injury is at least threatened. Therefore, the injury aspect of article III standing is met.

The second constitutional standing requirement is that the injury be traceable to the government employees' action. Here, it is. The church has not and apparently will not release the records voluntarily. But for the FCC's actions, no injury or threat of injury could have occurred. The government employees argue that if they have interfered with any first amendment rights, they are the rights of the church, for no request has been made of Scott personally. Superficially, the argument is plausible, but the law is otherwise. When a governmental demand "imposed on one part causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not . . . deprive the person harmed of standing to vindicate his rights" if he can establish that "the asserted injury was the consequence of the defendants' ac-

tions, or that prospective relief will remove the harm." *Warth v. Seldin, supra*, 422 U.S. at 505; *see United States v. SCRAP*, 412 U.S. 669 (1973); *Roe v. Wade*, 410 U.S. 113, 124 (1973).

The final requirement for article III standing is that a favorable decision would prevent or redress the injury. Scott alleges and we assume, *see* Part V, *infra*, that he may be entitled to damages if he has suffered a violation of his first amendment rights. Furthermore, if the action of the government employees threatens future violation of his first amendment rights, he is entitled to injunctive relief prohibiting their demands on the church for his donation records. A favorable decision would prevent or redress Scott's injury.

Scott therefore meets the constitutional requirements for standing. We turn now to the prudential requirements. His asserted harm is a particularized grievance, namely, the threatened or actual dissemination of his personal donation records, and he asserts his own legal rights and interests under the Constitution, not those of the church or of any third person. *See generally United States v. Raines*, 362 U.S. 17, 21-22 (1960); *Barrows v. Jackson*, 346 U.S. 249, 256-57 (1953); *Tileston v. Ullman, supra*, 318 U.S. at 46. The mere fact that the records which have been or may be taken are church records does not mean that the intrusion could violate only the church's rights. *See NAACP v. Alabama*, 357 U.S. 449, 458-59 (1958). Thus, Scott has standing in this case. We therefore turn to the merits of his claims.

III

Shortly after the FCC initiated its investigation, the Attorney General of the State of California began an investigation of similar allegations pursuant to then-effective California law. Scott alleges that the government employees

engaged in a series of telephone conversations and written communications with California officials, and thus participated in the state inquiry, including the state subpoena of church records, in violation of 42 U.S.C. § 1983. We assume for purposes of this appeal that federal employees, like private citizens, can act "under color of state law" and may be liable under section 1983 if they conspire with or participate in concert with state officials who, under color of state law, act to deprive a person of protected rights. *See Dombrowski v. Eastland*, 387 U.S. 82, 84 (1967) (per curiam); *Kletschka v. Driver*, 411 F.2d 436, 448-49 (2d Cir. 1969); *Peck v. United States*, 470 F. Supp. 1003, 1007 (S.D.N.Y. 1979).

Nevertheless, even when properly viewed in the light most favorable to Scott, the materials submitted in support of and in opposition to the motion for summary judgment present no genuine issue of material fact which can assist him. At most, the government employees requested information from, offered to exchange, and did exchange information with the California attorney general's office by means of which the two agencies assisted one another. The government employees denied by affidavit that they either instigated the state investigation or requested that state investigators procure information for them. Scott produced no evidence to the contrary. Therefore, Scott has raised no genuine issue of material fact which might support his claim for relief under section 1983. *See Angel v. Seattle-First National Bank*, 653 F.2d 1293, 1299 (9th Cir. 1981); *Marks v. United States*, 578 F.2d 261, 262-63 (9th Cir. 1978).

The state investigation, including the state subpoena of church records, is the only state action alleged in the complaint. We conclude that the FCC officers were not "willful participant[s] in joint activity with the State or its agents," *United States v. Price*, 383 U.S. 787, 794 (1966) (constru-

ing 18 U.S.C. § 242), simply because they may have furnished some information which facilitated the state investigation. Any FCC request for and receipt of information gathered by the state officials in the course of their independent investigation did not constitute action under color of state law. It is true that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *Monroe v. Pape*, 365 U.S. 167, 184 (1961) (*quoting United States v. Classic*, 313 U.S. 299, 326 (1941)), *overruled on other grounds, Monell v. Department of Social Services*, 436 U.S. 658 (1978). But even if we assume that the state officials violated Scott's first amendment rights in the course of their investigation, the mere fact that they may have shared with the government employees information unlawfully procured does not mean that the government employees acted under color of state law. If the government employees requested information from the state in this case, they acted under power possessed by virtue of *federal* law. If they obtained that information, it was because they were clothed with the authority of *federal* law. This, without more, is not enough to establish that their conduct was under color of state law. *See District of Columbia v. Carter*, 409 U.S. 418, 424-25 (1973).

IV

Scott also alleges that the government employees conspired with the California officials and with the church's ex-employees to deprive him of equal protection of the laws in violation of 42 U.S.C. § 1985(3). It may well be that a claim based upon a conspiracy to violate a protected right of religion could be stated pursuant to section 1985(3). *See Life Insurance Company of North America v. Reichardt*,

591 F.2d 499, 505 & n.15 (9th Cir. 1979). In this case, however, Scott has stated no claim for relief under the statute.

In *Griffin v. Breckenridge*, 403 U.S. 88 (1971), the Supreme Court held that section 1985(3) was not "intended to apply to all tortious, conspiratorial interferences with the rights of others." *Id.* at 101. Rather,

> [t]he language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.

Id. at 102 (footnotes omitted, emphasis in original). Scott has alleged no class-based, invidiously discriminatory animus for the alleged conspiracy. He has not alleged that the government employees deprived him of his first amendment rights because of his church membership or because he is one of a group holding certain religious beliefs or that the FCC action was in any other way class-based. He has failed to allege any facts from which we might infer a class-based animus. We therefore conclude that he has failed to state a claim for relief under the statute. *See Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980); *Life Insurance Company of North America v. Reichardt, supra*, 591 F.2d at 505; *Prochaska v. Fediaczko*, 473 F. Supp. 704, 709 (W.D. Pa. 1979) (conspiracy directed only toward the individual exercise of first amendment rights does not state a cause of action under section 1985(3)).

V

We must next decide whether Scott has a claim under the first amendment and, if so, what type of remedy is appropriate. We learned from the Supreme Court in *Bivens v. Six*

Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (*Bivens*), that a person whose fourth amendment rights have been violated by federal officers has a legal claim implied directly under the fourth amendment and is entitled to recover money damages for his injuries. The same right was extended to a claim arising from a violation of the fifth amendment in *Davis v. Passman*, 442 U.S. 228 (1979), and to a claim arising from a violation of the eighth amendment in *Carlson v. Green*, 446 U.S. 14 (1980). The question before us is whether, as with the fourth, fifth, and eighth amendments, a claim also arises under the Constitution for violations of first amendment rights by federal officials.

Ordinarily, a right of action for damages against government officials is given birth by statutory mandate. *See Bivens, supra*, 403 U.S. at 427-30 (Black, J., dissenting). The right of action judicially created in *Bivens* must accordingly be treated as an exception. That exception, however, is not limited to the fourth amendment. *See Davis v. Passman, supra*, 442 U.S. at 248. Indeed, the Court has expanded it to a principle of constitutional liability in very broad language:

> At least in the absence of "a textually demonstrable constitutional commitment of [an] issue to a coordinate political department," *Baker v. Carr*, 369 U.S. 186, 217 (1962), we presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.

Id. at 242.

While this analysis assists us with the disposition of this appeal, it is not necessary, as will soon be clear, for us to decide the ultimate issue of whether the first amendment provides a right of action. It is clear, however, that if first amendment rights are justiciable, then Scott is among "the class of litigants who allege that their own constitutional rights have been violated." *Id.* There has been no suggestion by the government employees that Scott is not among those "who at the same time have no effective means other than the judiciary to enforce these rights." *Id.* We assume, without deciding, that a private cause of action may be implied directly under the Constitution for violations of the first amendment. *See Trapnell v. Riggsby*, 622 F.2d 290, 294 (7th Cir. 1980); *Dellums v. Powell*, 566 F.2d 167, 194-95 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978); *Paton v. La Prade*, 524 F.2d 862, 869-70 (3d Cir. 1975).

Our next question is whether damages is an appropriate form of relief. In *Davis v. Passman*, the Court stated that "*Bivens* . . . holds that in appropriate circumstances a federal district court may provide relief in damages for the violation of constitutional rights if there are 'no special factors counselling hesitation in the absence of affirmative action by Congress.' " 442 U.S. at 245; *see Butz v. Economou*, 438 U.S. 478, 503-04 (1978). Holding that relief in damages was appropriate for violations of the due process clause of the fifth amendment, the Court identified the following policy factors as pertinent areas of inquiry: whether damages have been regarded historically as the ordinary remedy for the injury alleged, whether relief in damages would be judicially manageable, whether there are available alternative forms of judicial relief, whether evidence suggests that a damages remedy is contrary to the will of Congress, and whether such a remedy would open the courts to

a deluge of claims. 442 U.S. at 245-48.

Once more, however, it is unnecessary for us to decide whether these factors favor a damages remedy for violations of the free exercise clause by federal officials. We assume without holding that Scott is entitled to recover damages if his first amendment rights have been unjustifiably violated, *see Trapnell v. Riggsby, supra,* 622 F.2d at 294; *Dellums v. Powell, supra,* 566 F.2d at 194-95; *Paton v. La Prade, supra,* 524 F.2d at 869-70, and may be entitled to injunctive relief from a threat of a violation.

VI

We must next examine the record to determine if there is any genuine factual dispute whether the government employees violated Scott's first amendment rights. Scott alleges that the government employees informed the press and public that they were investigating charges of fraud against Scott. He claims that those statements interfered with the free exercise of his religious obligation to convert others to his beliefs. He also argues that the FCC's demand, in conjunction with its investigation, that the church provide records of his personal pledges during 1976 and 1977, together with information showing the status of those pledges (paid, withdrawn, or outstanding) violates the free exercise clause of the first amendment.

In support of their motions for summary judgment, the government employees submitted affidavits in which they stated that they did not provide any information to the press or public with respect to the specific allegations made against the church. They further testified that they made no statements to the press or public accusing Scott of any criminal or dishonest activity. Scott introduced letters prepared by two of the government employees in response to public and congressional inquiries concerning the investigation. Those

letters simply confirm that an investigation was in progress and that it was initiated in response to a complaint alleging irregular conduct. The letters further clarify the FCC's responsibility to investigate such complaints, including possible questions concerning the complainant's credibility. The letters do not, however, support Scott's allegations that the government employees dispatched charges of fraud to the press and public. Scott's allegations are unsupported by a factual presentation. Merely conclusory, they are insufficient to survive the government employees' motion for summary judgment. *Angel v. Seattle-First National Bank, supra,* 653 F.2d at 1299; *Marks v. United States, supra,* 578 F.2d at 262-63.

Scott's second argument about the investigation of his pledges presents more difficult questions. It is complicated by the fact that the church owns the broadcast station. Our analysis must be on two levels first, the result of the actions of the FCC in relation to the station and second, the result of its actions in relation to Scott.

We start with the proposition that first amendment analysis may be different for broadcasters than for members of other types of media. A greater degree of conflict with traditional first amendment principles is tolerated with the broadcast media because of the limited number of available frequencies. *FCC v. Pacifica Foundation,* 438 U.S. 726, 748 (1978) ("[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection."); *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 383, 386-89 (1969) (broadcast frequencies are a "public trust"; "differences in the characteristics of [the broadcast] media justify differences in the First Amendment standards applied to them."); *see Buckley v. Valeo,* 424 U.S. 1, 49 n. 55 (1976) (per curiam) (distinguishing broadcast media cases from traditional free speech cases); *Columbia*

Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 101 (1973) ("*Red Lion Broadcasting Co. v. FCC* makes clear that the broadcast media pose unique and special problems not present in the traditional free speech case.") (citation omitted); *cf. Red Lion Broadcasting Co. v. FCC, supra*, 395 U.S. at 375 (fairness doctrine "enhance[s] rather than abridge[s] the freedoms of speech and press protected by the First Amendment"). The first question, therefore, is should the FCC be required to meet a different standard prior to investigation of broadcasters of religious programs than it is required to meet prior to investigation of broadcasters of secular programs? More specifically, should the FCC be required to demonstrate a compelling governmental interest prior to investigating an allegation of fraud by one of its licensees that is owned by or affiliated with a religious organization? We hold that such a requirement is not necessary.

The Federal Communications Act authorizes the FCC to regulate as required by the "public convenience, interest, or necessity," 47 U.S.C. § 303, and does not differentiate types of broadcast licensees. The FCC grants licenses and regulates the public airwaves without differentiating between religious and secular broadcasters. *See, e.g., In re PTL of Heritage Village Church & Missionary Fellowship, Inc.*, 7 F.C.C.2d 324 (1979). In addition, courts have approved the application of FCC rules to religious groups on the same basis as applied to secular groups. *See Red Lion Broadcasting Co. v. FCC, supra* (fairness doctrine applied to broadcast of a religious program without distinguishing religious and secular broadcasting); *King's Garden, Inc. v. FCC*, 498 F.2d 51, 60 (D.C. Cir. 1974) ("But, like any other group, a religious sect takes its franchise 'burdened by enforceable public obligations.' "), *cert. denied*, 419 U.S. 996 (1974); *accord Brandywine-Main Line Radio, Inc.*

v. FCC, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973); *Trinity Methodist Church v. Federal Radio Commission*, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933); Hardy & Secrest, *Religious Freedom and the Federal Communications Commission*, 16 Val. U.L. Rev. 57 (1981).

Requiring the FCC to justify investigations undertaken in response to allegations of fraud by one of its licensees, religious or secular, is not supported by precedent, is impracticable, and might raise other first amendment obstacles. *See, e.g., Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion."). Allowing such an investigation of a broadcast station, however, does not necessarily mean that the investigation may be open ended. During the investigation, free expression conflicts may arise. This brings us to the second level of our analysis which pertains to the acts of the FCC in relation to Scott. When a collision between portions of an FCC investigation and free exercise rights occurs, free exercise rights can be protected by requiring the FCC to demonstrate a compelling governmental interest. A compelling governmental interest must be shown at that point because an action taken in the course of an investigation directly conflicts with a sincerely held religious belief. *See generally EEOC v. Pacific Press Publishing Association*, 676 F.2d 1272 (9th Cir. 1982) (government's compelling interest in ensuring equality in employment opportunity justified burden on exercise of religious publisher's policy prohibiting suits by members against the church).

Here, we conclude that it is necessary to employ compelling state interest analysis because of the unique factual setting. The FCC requested information, the release of which

Scott alleges in and of itself violates his religious free exercise right. Thus, there is a direct conflict between a sincerely held religious belief and an action by government officials. As stated by the Fifth Circuit in examining employment policies at a religiously-affiliated college, "the relevant inquiry is not the impact of the [government action] upon the institution, but the impact of the [government action] upon the institution's exercise of its sincerely held religious beliefs." *EEOC v. Mississippi College*, 626 F.2d 477, 488 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981).

Therefore, we conclude that we can affirm the district court's order granting summary judgment only if the FCC's demand for the records of Scott's donations does not infringe on his first amendment freedoms or, if it does, a compelling governmental interest justifies the demand. *Sherbert v. Verner*, 374 U.S. 398, 406-07 (1963); *see Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972). *Id.* at 215.

In support of his claim, Scott submitted personal affidavits in which he states that he believes that his church contributions are "sacrifices" and that disclosure of his sacrifices would violate their sacred nature. The government employees do not challenge the sincerity of Scott's beliefs. *See generally United States v. Ballard*, 322 U.S. 78 (1944). Furthermore, Scott's claim is not "so bizarre, so clearly non-religious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Thomas v. Review Board of the Indiana Employment Security Division*, 40 U.S. 707, 715 (1981) (*Thomas*). We therefore conclude that the FCC's demand interferes with Scott's first amendment rights.

The conclusion that there is conflict between Scott's beliefs and the demand imposed by the FCC is "only the beginning, however, and not the end of the inquiry. Not all burdens on religion are unconstitutional." *United States v.*

Lee, ___ U.S. ___, ___, 102 S. Ct. 1051, 1055 (1982); *see Braunfeld v. Brown*, 366 U.S. 599 (1961); *Prince v. Massachusetts*, 321 U.S. 158 (1944). The state may justify its infringement on religious liberty if it is necessary to accomplish an overriding governmental interest. *United States v. Lee, supra*, ___ U.S. at ___, 103 S. Ct. at 1055; *Thomas, supra*, 450 U.S. at 718; *Wisconsin v. Yoder, supra*, 406 U.S. at 215; *Sherbert v. Verner, supra*, 374 U.S. at 406; *see also EEOC v. Pacific Press Publishing Association, supra*, 676 F.2 at 1279 ("In determining whether a neutrally based statute violates the free exercise clause, courts must weigh three factors: (1) the magnitude of the statute's impact upon the exercise of the religious belief, (2) the existence of a compelling state interest . . ., and (3) the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state."). We must therefore determine whether the governmental interest in preventing the fraudulent practices alleged is sufficiently compelling to justify the burden upon Scott's right to the free exercise of his religion and, if so, whether the demand for church records of Scott's pledges and donations was necessary to further that interest. Whether a governmental interest is or is not compelling is a question of law. *See United States v. Lee, supra*, ___ U.S. at ___, 102 S. Ct. at 1055-56; *Thomas, supra*, 450 U.S. at 718-19.

The governmental interest in preventing some crimes is compelling, *see Prince v. Massachusetts, supra*, 321 U.S. at 166-67, but that interest is not sufficient to permit interference with free exercise rights in every case. *See Wisconsin v. Yoder, supra*, 406 U.S. at 215. The Supreme Court has repeatedly stated that religious frauds can be penalized. *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940) (dictum) ("Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may,

with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct."); *Schneider v. State*, 308 U.S. 147, 164 (1939) (dictum) ("fraudulent appeals may be made in the name of charity and religion . . . [which] may be denounced as offenses and punished by law"); *see United States v. Ballard, supra*, 322 U.S. at 95 (Jackson, J., dissenting) ("religious leaders may be convicted of fraud for making false representations on [some] matters . . . as for example if one represents that funds are being used to construct a church when in fact they are being used for personal purposes"). Lower courts have applied this principle to religious organizations conducting fraudulent non-religious activities. *see SEC v. World Radio Mission, Inc.*, 544 F.2d 535 (1st Cir. 1976), *disapproved on other grounds, Aaron v. SEC*, 446 U.S. 680, 687 n. 7 (1980), and to individuals soliciting money for pretended religious purposes when religious beliefs were not sincerely held, *see People v. Estep*, 346 Ill. App. 132, 104 N.E.2d 562, *writ dismissed*, 413 Ill. 437, 109 N.E.2d 762 (1952), *cert. denied*, 345 U.S. 970 (1953); *People v. Le Grande*, 309 N.Y. 420, 131 N.E.2d 712 (1956), and have concluded that the protections of the first amendment were not applicable.

Here, however, we face the question whether, when an allegedly fraudulent activity is connected with the exercise of sincerely held religious beliefs, the governmental interest in preventing fraud overrides the individual's right of religious freedom. We conclude that the answer depends, at least in part, on the nature of the fraud. We recognize that the protections of the free exercise clause do not "turn upon a judicial perception of the particular belief or practice in question. . . . Courts are not arbiters of scriptural interpretation." *Thomas, supra*, 450 U.S. at 714, 716; *cf. United States v. Ballard, supra* (courts may inquire into sincerity,

but not truth or falsity, of religious tenets). This case does not involve only an allegation that Scott made certain pledges during his broadcast, but failed to pay them. The FCC investigation centered on allegations that Scott had solicited funds for certain specific projects which had never been undertaken. *See id.* at 95 (Jackson, J., dissenting). Scott claims that in the framework of his religion, it is only important that the contributor give and, having made the gift, the contributor is spiritually blessed, not matter how his donation is used. Scott further states that he must follow "the leanings of the Lord" with respect to the utilization of donations. Scott does not claim, however, that contributors to identified projects know that their contributions may be used for any purposes which Scott determines to be in accordance with the will of the Lord. Scott does not claim that he clarified this aspect of his religious practice in his broadcast solicitations. At least under these limited circumstances, we conclude that the government has a compelling interest in preventing the diversion of funds from the specifically identified projects for which they have been solicited.

Our final inquiry is whether the government's investigation of Scott's pledge and donation records was necessary to further this compelling interest. We need not determine whether any other aspects of the FCC investigation were justifiable, for Scott contests only the FCC demand for those records. Although not every allegation of fraudulent solicitation would justify the government's interference with the religious practices of individuals and churches, we conclude that the allegations here justified the FCC's narrow and limited inquiry into Scott's donation records.

Several important considerations support this conclusion. First, we believe that the context in which the pledges were made is significant. When Scott and the church decided to

acquire television and radio stations, they availed themselves of facilities which, under congressional mandate, must be operated in the public interest. 47 U.S.C. §§ 307(a), 309(a). With respect to the operation of broadcast facilities, the Supreme Court has held that the right of viewers and listeners, not that of broadcasters, is paramount. *Columbia Broadcasting System, Inc. v. Democratic National Committee, supra,* 412 U.S. at 102, *citing Red Lion Broadcasting Co. v. FCC, supra,* 395 U.S. at 390; *see also Writers Guild of America, West, Inc. v. America Broadcasting Co.,* 609 F.2d 355, 362 (9th Cir. 1979), *cert. denied,* 449 U.S. 824 (1980). An allegation of fraud, even if not sufficiently specific or reliable generally to justify inquiry into solicitations made by a congregation in church, may nevertheless be sufficient to justify inquiry into broadcast solicitations.

Second, the FCC investigation in this case was premised on information sufficiently reliable to justify the limited intrusion on first amendment rights which it engendered. The FCC began its inquiry only after it received a complaint signed by Diederich, a former employee of the television station. In his former employment, Diederich was in a position in which he was likely to have received personal knowledge of the irregularities he alleged. His signed complaint, if knowingly false, could expose him to liability in tort for malicious prosecution, *see, e.g., Morfessis v. Baum,* 281 F.2d 938, 940 (D.C. Cir. 1960); *Hardy v. Vial,* 48 Cal. 2d 577, 580-81, 311 P.2d 494, 496-97 (1957); *Dixie Broadcasting Corp. v. Rivers,* 209 Ga. 98, 70 S.E.2d 734 (1952) (action before FCC), and was therefore entitled to a greater inference of reliability than an unsigned statement would have been. Furthermore, before they sought to inspect church records, the government employees conducted several interviews in which they received information to support Diederich's allegations. Certainly, governmental agencies must

be wary of complaints which cannot be investigated without interfering with first amendment rights. Malicious or unsubstantiated allegations could easily be used to harass unpopular religions and their leaders. We are satisfied, however, that the information upon which the FCC acted was sufficiently reliable to justify its investigation.

Third, the investigation in this case was narrow and avoided any unnecessary interference with the free exercise of religion. We can imagine circumstances in which the interference with religion could be substantial enough to overbalance a governmental interest that otherwise would be compelling, but that is not this situation. There was no request for wholesale investigation of the church's financial records, but rather specific requests for records of an FCC licensee concerning Scott's salary and donations, both of which he allegedly misrepresented during broadcast solicitations. The added request, not challenged here, for access to the video tapes of broadcast solicitations and church records detailing the receipt and expenditure of publicly solicted funds also demonstrates the limited focus of the investigation.

Finally, the FCC's demand for access to Scott's donation records was necessary to serve its compelling interest in investigating the alleged diversion of funds. If, as alleged, Scott solicited funds for projects which were never undertaken or if funds contributed to those projects were illegally diverted to other uses, Scott's misrepresentation of his personal pledges may have been intended to induce those contributions and therefore could constitute part of a scheme to defraud. Although other information might be only tangentially relevant to the objectives of a legitimate inquiry, the nexus between the investigations and the FCC's objective in this case was sufficiently close to comply with the principle that valid restrictions on first amendment rights must embody the least restrictive means of effectuating the

government's compelling interest. *See Thomas, supra,* 450 U.S. at 718; *Sherbert v. Verner, supra,* 374 U.S. at 407, *citing Shelton v. Tucker,* 364 U.S. 479, 487-90 (1960). *See generally United States v. Lee, supra,* ___ U.S. at ___, 102 S. Ct. at 1056 ("Religious beliefs can be accommodated, but there is a point at which accommodation would 'radically restrict the operating latitude of the legislature.' ", *quoting Braunfeld v. Brown,* 366 U.S. 599, 606 (1961)) (citation omitted).

VII

Scott also claims that the actions of the government employees violated the establishment clause of the first amendment. He apparently believes that inquiry into his donation record is only the first step in a contemplated program of pervasive regulation. The government employees have submitted affidavits in which they state that their inquiries were for the purpose of ascertaining the truth of Diederich's allegations and determining whether renewal of the church's license was in the public interest. Scott has alleged no facts from which we can infer that pervasive regulation is either planned or threatened. The government employees were therefore entitled to summary judgment on the establishment claim. *Angel v. Seattle-First National Bank, supra,* 653 F.2d at 1299; *Marks v. United States, supra,* 578 F.2d at 262-63.

We hold that the government employees have not unjustifiably violated Scott's first amendment rights, and therefore do not reach the question of immunity. *See generally Butz v. Economou, supra* (absolute and qualified immunity); *Scheuer v. Rhodes,* 416 U.S. 232 (1974) (qualified immunity).

AFFIRMED.

APPENDIX "B".

Petition for Rehearing [FRAP 40]
Suggestion for Rehearing in Banc [FRAP 35a].

United States Court of Appeals for the Ninth Circuit.

Reverend W. Eugene Scott, Ph.D., Plaintiff-Appellant, vs. Joel Rosenberg, et al., Defendants-Appellees. No.: 81-5387. D.C. No.: 78-3132 AAH.

Appeal from the United States District Court for the Central District of California.

Andrew A. Hauk, District Judge, Presiding. Argued and Submitted March 3, 1982.

Filed: March 1, 1983.

INTRODUCTORY STATEMENT OF COUNSEL AND SUGGESTION FOR REHEARING IN BANC

After a thorough review of the Opinion of this Honorable Court which was filed on January 21, 1983, it is the judgment of this writer, as counsel for Plaintiff-Appellant REVEREND W. EUGENE SCOTT, Ph.D. (hereafter, "SCOTT") that the Court's Opinion has overlooked and/or misapprehended certain crucial points of fact and a crucial point of law as set forth fully and argued below. Also, it is the belief of this counsel that the instant Opinion is in conflict with another recently decided Opinion of this Court, viz: *U.S., et al., vs. Trader's State Bank, et al.*, No. 81-3275 (D.C.Mont.), decided January 4, 1983. Lastly, it is the desire of SCOTT to direct the attention of the Court to a recent decision of the United States Supreme Court, decided on December 8, 1982, which may have bearing on the disposition of the instant action.

Specifically, the Court's attention is directed to the following:

1. The Court concludes in balancing the interests of the government in preventing alleged fraud over the airwaves

with the intrusion into the first amendment rights of SCOTT that the intrusion is justified because it was instigated only after a complaint by Diederich, a fired, former employee of the Church pastored by SCOTT. Nowhere, however, in the record of this action or any related action did Diederich make such an accusation against SCOTT. This fact is clearly stated in Exhibit "A" attached to this Petition viz. the sworn Deposition of Paul Diederich. Further, the FCC has stated under oath that only one other witness save Diederich exists: Mr. Joseph Baumgartner. It should be noted here that unlike Diederich, Baumgartner was *solicited* by the government as a witness. He and Diederich are the sum total of a five year full-scale investigation by the FCC. Mr. Baumgartner has also denied under oath ever making allegations of fraud concerning SCOTT or the Church which he pastors. (See Exhibit "B" attached hereto, the sworn Deposition of Joseph Baumgartner.) Had the District Court allowed SCOTT to pusue any discovery in this action, the fact that the FCC Defendants-Appellees (hereafter, "FCC") based their assault on the honor, reputation and first amendment rights of SCOTT not only on no reliable evidence, but on no evidence at all would have become immediately clear.

2. The Court in performing the test of balancing the interests of the government with the first amendment rights of SCOTT overlooks the second, crucial aspect of that test: That there exists no less restrictive or entangling alternative to the intrusion into first amendment rights. See *Sherbert v. Verner*, 374 U.S. 398 at 407, *Walz v. Tax Commission*, 397 U.S. 664 at 674-675 (1970), *Wisconsin v. Yoder*, 406 U.S. 205 at 220-221 (1972).

3. The Court's recent decision in *Trader's State Bank, supra*, is in conflict with this decision on the issue of whether or not there exists a rational nexus between the disclosure required by the summons and a legitimate governmental end.

4. The Court's attention is also directed to *Brown v. Socialist Worker's '74 Campaign Committee*, No. 81-776, U.S. Law Week, Vol. 51, No. 22, decided December 8, 1982. A copy of this decision is attached hereto as Exhibit "C."

ARGUMENT

The issue of the standing of SCOTT to bring this action was the be-all and end-all of the Report and Recommendation of the Magistrate and this was adopted by the District Court. "Because it is believed by the Magistrate that the 'lack of standing' of Plaintiff (SCOTT) is clear and dispositive, this Report does not analyze, report or recommend upon such additional contentions raised by the parties as lack of personal jurisdiction over four of the five Federal Defendants (FCC), the lawfulness of the scope of *the federal investigation of the corporations*, the lawfulness of the state investigation, the propriety of the conduct of individual Defendants, or the propriety of cooperation between the State Attorney General and the FCC, inter alia." (Emphasis added) (CR 110 pp. 22-23.) Thus, because the Magistrate believed that SCOTT lacked standing, the violation of rights complained of in his Second Amended Complaint were ignored, the action dismissed and summary judgment granted. This Honorable Court disagrees with the District Court's conclusion. SCOTT is adjudicated to possess standing (Opinion, p. 5, 7), and the Court concludes that the demands of the FCC interfered with SCOTT's rights under the first amendment (Opinion, p. 18). It is only in the misapprehension of the factual circumstances of the FCC's intrusion into SCOTT's first amendment rights that this Court finds against him.

As clearly demonstrated in Exhibits "A" and "B" attached hereto, which are sworn depositions of Paul Diederich and Joseph Baumgartner, respectively, neither of these two men who are admitted by the FCC to be its only witnesses in the matter, ever witnessed or charged any fraud against either SCOTT or the church he pastors. These sworn documents must be read in light of the document upon which this Honorable Court bases its conclusion of the reasonableness of the investigation: the Affidavit of Joel Rosenberg, CR 76, p. 3. Therein, Rosenberg claims to have "conducted a number of interviews with persons who might have information concerning the allegations which were made against the licensee. A similar allegation was again made regarding the solicitation and non-expenditure of funds." (CR 76, p. 3, lines 10-14.) Rosenberg fails to name the persons present at those alleged interviews, but in a related action discovery disclosed that the FCC possessed only two witnesses: Diederich and Baumgartner, both of whom have denied under oath any and all of their purported allegations of any fraud either by the licensee or by SCOTT. It is also interesting here to note that since the investigation of SCOTT and the church which he pastors began, the FCC has not produced one viewer, one member of the class protected by FCC rules and regulations (See *C.B.S. v. Democratic National Committee*, 412 U.S. 94, 102 [1973]) who has complained of any violation of the law by SCOTT or his church. The conclusion drawn from the facts at hand is simple: The persecution of SCOTT and his church has been based on nothing. It is a prime example of the harassment of unpopular or troublesome religious groups which the Court seeks to guard against (Opinion, p. 24, lines 1-3).

The question of whether or not a governmental interest is or is not compelling is, as the Court states, a matter of law. However, without a well-developed factual foundation,

regarding the circumstances of each individual action, the Court is deprived of the data necessary for proper adjudication of claims. For this reason, no claim should be dismissed unless it appears to a certainty that the Plaintiff would be entitled to no relief under any state of facts. (See Brief of Appellant and cases cited therein, pp. 10-11.) Likewise, Summary Judgment should not be granted unless the moving party can demonstrate that there is no genuine issue as to any material fact, and that he is entitled to judgment as a matter of law.

In this instant action, Plaintiff-Appellant SCOTT is in a Catch 22. The District Court found his lack of standing dispositive of all other issues, allowed no discovery and dismissed the action. This Honorable Court has concluded both that SCOTT has standing, and that the actions of the FCC were violative of his first amendment rights. (Opinion, p. 5, 7, 18.) However, the Court finds the actions of the FCC justified based on a record that allowed no development of the facts surrounding the intrusion.

Appellant respectfully suggests that in light of its own determination of SCOTT's standing, and the conclusion that SCOTT's first amendment rights were compromised by the FCC, that this Honorable Court remand the action to the District Court so that full discovery and trial on the merits of the action might be allowed.

Plaintiff-Appellant SCOTT also petitions this Court for rehearing based on the grounds that the Opinion in its analysis of the balancing of the governmental interest with SCOTT's first amendment rights, seems to have overlooked a critical portion of the rule that governs such decisions. In *Surinach v. Pesquera de Busquets*, 604 F.2d 73 (1979), the U.S. Court of Appeals for the First Circuit states: "Given our conclusion that the Secretary's demands for the financial data of these schools both burden the free exercise of religion

and pose a threat of entanglement between the affairs of church and state, the Commonwealth must show that 'some compelling state interest' justified that burden. *Sherbert v. Verner,* (cite) see *Wisconsin v. Yoder,* (cite), and *there exists no less entangling or restrictive alternative.* See *Sherbert v. Verner,* supra, 374 U.S. at 407, 83 S.Ct. 1790; *Walz v. Tax Commission,* supra, 397 U.S. At 674-675, 90 S.Ct. 1409; L Tribe, *American Constitutional Law,* 851-55 (1978)." [*Surinach, supra,* 604 F.2d at 79. Emphasis in the text added.]

In this action, a resort to such a less burdensome alternative coupled with a small degree of sensitivity to the bona fide religious beliefs of others on the part of the FCC probably would have prevented the confrontation in toto. The record demonstrates clearly that both SCOTT and the church he pastors recognized their obligations as licensees of the FCC when the investigation began, and cooperated with the FCC so far as the tenets of their Faith would allow. All desired material relevant to the projects for which monies were allegedly raised and allegedly not spent were provided immediately. (See CR 64, 65, 115. Affidavits of Peter Van Name Esser, Bruce Henderson and W. Eugene Scott, respectively.)

At the issue of donation records which contain evidences of giving that the church members consider to be a private transaction between the giver and his God, SCOTT felt compelled to draw the line. It was, as stated in the Opinion an interference with his first amendment rights. SCOTT did, however, offer and provide to the FCC sworn affidavits by church personnel who had personal knowledge of SCOTT's donations, which stated without equivocation that all pledges made by SCOTT were paid in full and often exceeded the amount pledged. Were these affidavits to be found untrue, the affiants would be under jeopardy of prosecution for

perjury (Title 18 U.S.C. §1621) a crime punishable by five years in prison and a fine of two thousand dollars. The FCC refused to accept these affidavits in the matter in spite of the fact that it did not then and does not now have any statement by anyone with personal knowledge of SCOTT's donations to the contrary. True and correct copies of these affidavits are attached hereto as Exhibit "D."

In its Opinion (pgs. 21-22), this Honorable Court expresses its concern that the viewing public might not understand the "will of the Lord" aspect of the Theology of Christian Giving. Again, Appellant's Catch 22 for want of a factual record is exhibited by this expressed concern. A factual hearing would have demonstrated that "if the Lord wills" is not a whim, but the very foundation of the Faith. The concept is clearly stated on the faith promise slips given to each and every potential donor. A true and correct copy of said faith promise slip is appended hereto as Exhibit "E." By the tenets of the Faith, Scott has the right, and in fact obligation, to designate "faith promise" monies according to the Scriptural command, "if the Lord wills." [James 4:15.] Christ's Church, and its pastor, *must* be led by the Lord. The Apostle Paul in the Book of Acts set out to take the Gospel of Jesus Christ to Asia. He said he could not go to Asia because "the Spirit constrained [him]." [Acts 16:7.] He thereafter, not knowing where to go, was led by a vision to Philippi, in eastern Greece. Thus did Christianity come to Europe. Paul's life was conditioned by "if the Lord wills." Plaintiff herein is bound as well by the long and deeply-held religious belief that he must pattern his life after and teach his followers, who at one time included these so-called "FCC witnesses," to pattern their lives according to this Scriptural principle.

The affidavits which are attached hereto as Exhibit "D" offered to the FCC a less entangling alternative that should

have resolved the matter of SCOTT's personal donations at the very outset. Unlike *Red Lion* and *King's Garden* (cited by this Honorable Court in its Opinion at p. 16), which concern the so-called "fairness doctrine" and equal employment laws, respectively, the issue in this instant action, as in *Trader's State Bank, supra,* is governmental interference with a first amendment freedom. Such rights are preferred rights in a Constitutional framework and such balancing as must be done by the intruding governmental agency must be done at the time of the intrusion. *Thomas v. Collins,* 323 U.S. 516, 530 (1944).

When the balancing is not done until an action reaches a Court of Appeals, after it has been dismissed with no opportunity having been given to establish a factual foundation, the bulwark of rights as set forth in *Thomas v. Collins* and its progeny are summarily destroyed.

This becomes all the more insidious with an administrative proceeding which threatens criminal penalties, makes unfounded accusations of crimes, yet offers to cite none of the traditional protections constitutionally mandated in criminal proceedings. At no time did any government agent ever tell SCOTT "we have signed allegations of fraud," and it was three years before SCOTT even knew the identity of the witnesses against him. The FCC found no grave abuses endangering paramount interests, yet it made demands with no regard for SCOTT's first amendment rights, and the balancing of rights was the farthest thing from their minds. Further, the record shows that only on one occasion did SCOTT publicly pledge his own funds. This was in connection with the payment of the Church mortgage and the construction of the Fountain of Faith. In spite of this fact, the FCC demanded not only SCOTT's records in regard to this donation, but all other donation records too. Here, as well, the cautions and concerns as expressed in *Trader's Bank* should come into operation.

CONCLUSION

It is because of the Court's overlooking of the "Less Entangling Alternative" test which throws this Opinion in conflict with the United States Supreme Court decisions of *Sherbert v. Verner, supra, Walz v. Tax Commission, supra,* and *Wisconsin v. Yoder, supra,* and because of the dissonance with the principles of *Thomas v. Collins, supra,* that Appellant respectfully suggests a Rehearing in Banc pursuant to FRAP 35a. The question is of exceptional importance, for the Court's Opinion truncates a crucial safeguard of first amendment rights as premised in the above-cited cases.

Dated: February 28, 1983

Respectfully submitted,

/s/ Bruce Henderson
BRUCE HENDERSON
HENDERSON & ESSER
Attorneys for Appellant

APPENDIX "C".

Order Extending Time to File Petition for Writ of Certiorari.

Supreme Court of the United States.

No. A-1058.

M. Eugene Scott, Petitioner, v. Joel Rosenberg, et al.

Upon Consideration of the application of counsel for petitioner.

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 1, 1983.

/s/ William H. Rehnquist
Associate Justice of the Supreme
Court of the United States

Dated this 30th day of June, 1983

APPENDIX "D".

1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

—United States Constitution, Amendment I

2. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

—United States Constitution, Amendment V